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No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief is most significant for what it does not say. Respondents do *not* deny that the damages sought by petitioner are unavailable in state post-conviction or federal habeas proceedings. Respondents do *not* assert that petitioner's claim raises doubts about the correctness of any state judicial determination. And, despite much hemming and hawing, respondents do *not* contend that a victory by petitioner in his damages action will have preclusive effect in subsequent state post-conviction proceedings. But respondents nevertheless insist that petitioner's federal action must be dismissed so that a state court—in the course of the exhaustion of state procedures that concededly cannot provide petitioner with the only relief he seeks—will have the opportunity to opine on petitioner's constitutional claims.[1] Not surprisingly, this counter-intuitive argument is not compelled by principles of comity and cannot be reconciled with this Court's precedent. It should be rejected.

I

1. As we have explained (Br. 20-23), this Court cannot hold for respondents without overruling *Wolff* v. *McDonnell*, 418 U.S. 539, 553-555 (1974), and disavowing the reasoning of *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Respondents' efforts to explain away these decisions are wholly insubstantial. They first suggest that the Court may disregard its statements in *Wolff* because that case, unlike (purportedly) this one, did not involve "an attack on the legality of a valid state court convic-

[1] In fact, we have been informed that petitioner has received a parole release date of May 1, 1994. Petitioner's release, however, will have no bearing on the live nature of the controversy in this case. If the court below correctly dismissed petitioner's Section 1983 action, petitioner will have to initiate a new lawsuit, which will be met with a statute-of-limitations defense and may be time-barred. If the court erred in dismissing the action, petitioner's suit will proceed on the merits.

tion." Resp. Br. 26.[2] But we explained in our opening brief (at 22-23) that the Court stated in *Preiser*—in a portion of the opinion that most certainly was *not* dictum—that an attack on the length of confinement (which was at issue in *Wolff*) and an attack on the conviction itself are *equally* "close to the core of habeas corpus." 411 U.S. at 489. Respondents simply ignore that principle, which establishes that the situations here and in *Wolff* are not distinguishable for comity purposes.[3]

Nor are respondents successful in dismissing *Wolff* on the ground that "[n]othing in *Wolff* suggests that the prisoners were seeking damages to compensate them for the *actual loss* of good-time credits," so that "[t]he prisoners' damages claims appear to have been intended to compensate them for being subjected to unconstitutional *procedures* relating to the withdrawal of good-time credits, *irrespective of the results of those procedures*." Resp. Br. 26 (emphasis added). Although we wholeheartedly agree with respondents that the violation of constitutional rights occurring in the process of determining guilt or punishment may give rise to a valid damages claim *regardless* of the outcome of those processes (but cf. Resp. Br. 8 n.4), we fail to see how this distinction makes any difference in the proper interpretation of *Wolff*. As we explained in our opening brief (at 22), if the prisoners in *Wolff* succeeded in demonstrating that the prison procedures used to withdraw good-time credits were unconsti-

[2] As explained below (see pp. 5-6, *infra*), respondents are in any event mistaken in their repeated assertion that this case involves an "attack" on petitioner's conviction or that in order "to award damages, a federal court would first have to find that petitioner's conviction was wrongful." Resp. Br. 13-14; *id.* at 20.

[3] Respondents rely on "the distinctive comity concerns relating to federal court deference to state *courts*," a concern they say "played no part in *Wolff*." Resp. Br. 26 (emphasis added). But that argument also ignores the teaching of *Preiser*, as we explained in our opening brief (at 26 n.13) and as to which respondents have offered no colorable response (see Resp. Br. 18 n.7).

tutional, then any such withdrawals would likewise have been invalid. Respondents offer no response on this point. And their distinction is even less tenable because the prisoners in *Wolff* in fact contended that the withdrawal of good time was *itself* part of the deprivation of liberty that gave rise to their due process claim. See Resp. Br. No. 73-679, at 15 (arguing that "the loss of good time remained a salient and essential factor to be weighed in considering" whether the plaintiff prisoners had suffered a "grievous loss" sufficient to trigger a due process action).[4]

Respondents' efforts to minimize *Preiser* (Resp. Br. 27-28) should be rejected as well. Respondents never come to grips with this Court's unambiguous declaration in *Preiser* that "[i]f a state prisoner is seeking damages, he is attacking *something other than* the fact or length of his confinement * * *." 411 U.S. at 494 (emphasis added). Respondents contend that "[b]y its own terms, this dictum is limited to situations where, *unlike* here, a state prisoner is 'attacking something other than the fact * * * of confinement.'" Resp. Br. 28 (emphasis in original)). But this is a plain misreading of the Court's opinion, which explained that "[i]f a state prisoner is seeking damages," by definition "*he is* attacking something other than the fact or length of his confinement." 411 U.S. at 494 (emphasis added). Indeed, respondents' assertion that the *Preiser* Court did not have cases like

[4] Respondents are equally mistaken in contending that this Court's relevant teachings in *Wolff* "may be fairly characterized as dictum" because "it is unclear whether damages could have been recovered by the prisoners in *Wolff*, given this Court's decision not to apply its holding retroactively." Resp. Br. 27 n.11. The crucial point for present purposes is that the Court reached the merits of the *Wolff* prisoners' claims—which it would not have done had the rule of *Preiser* applied. Not surprisingly, respondents cite no decision of any court that has regarded this portion of *Wolff* as dictum, and we are aware of none. See also, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (citing and relying on this portion of *Wolff*).

this one in mind is flatly belied by *Preiser*'s illustrative citation to *Ray* v. *Fritz*, 468 F.2d 586 (2d Cir. 1972), the significance of which was explained in our opening brief (at 22 n.10) and is not disputed by respondents. Respondents also are mistaken in saying that this Court "[a]cknowledg[ed]" that the foregoing statement in *Preiser* was "unnecessary to its decision." Resp. Br. 27. On the contrary, the Court's statement in *Preiser* was made in the course of rejecting an argument that, if accepted, would have pointed to a result contrary to that reached by the Court. That hardly qualifies as dictum.

2. The rule of *Wolff* and *Preiser* is not the "formalism" derided by respondents (Br. 9). The Court's rationale in *Preiser* was clear: habeas corpus provides the most specific remedy for a prisoner requesting release. And habeas corpus plainly was available to the prisoner-plaintiffs in *Preiser*, who quite literally had, in challenging their release dates, effectively taken a habeas petition and put "a different label on their pleadings." 411 U.S. at 490. That is demonstrably not true here, where the relief requested is not available in federal or state habeas and the defendants are not the ones who would be named in a habeas action—all as respondents do not deny. It is hardly formalistic to decline to apply a rule where its rationale has no application.

In fact, far from being artificial, the approach of *Wolff* and *Preiser*, which turns on whether the plaintiff seeks damages or release, is the most manageable and logical approach in this area. As we explained in our opening brief (at 29-31), respondents' rule—which, as we understand it, would have the necessity of exhaustion turn on the determination whether the Section 1983 action "attack[s] the legality of a valid state-court conviction" (Resp. Br. 8-9)—is not nearly so simple as respondents would have the Court believe. As we noted, any number of meritorious constitutional challenges to aspects of the investigation and prosecution of a criminal case may not call the validity of the conviction into question. See

Haring v. *Prosise*, 462 U.S. 306 (1983). Respondents dismiss this problem with the assertion that lower courts have had no difficulty determining when challenges go to the validity of a conviction. Resp. Br. 25. But that contention is not responsive; our point is that no matter how "easy" it is, conducting the proper inquiry diligently is a time-consuming matter that will require the federal court to engage in a review of the merits of the Section 1983 action *before* deciding whether exhaustion is appropriate. Cf. *Davis* v. *Rendell*, 659 F.2d 374, 378 (3d Cir. 1981).

Some of these possible difficulties are illustrated by this case itself. Respondents repeatedly contend that petitioner's damages claim is an "attack [on] a valid Indiana conviction" (Resp. Br. 6) or "an attack on the legality of [petitioner's] conviction and the propriety of his continued confinement." *Id.* at 5; see also *id.* at 1, 6, 8, 11, 14, 16, 18, 20, 23, 24, 25, 26 n.10, 26, 28, 30, 32, 34. Respondents also suggest that *all* of the damages petitioner seeks to recover flow from "the alleged wrongfulness of his confinement." *Id.* at 8 & n.4. See also *id.* at 23. Petitioner's claim, however, is not an attack on his conviction or his continued confinement but rather a challenge to *the lawfulness of the individual defendants' actions.*[5]

[5] Respondents therefore are incorrect in contending that "[n]either in his complaint nor at any other time throughout these proceedings has petitioner suggested that his claimed damages relate to anything other than his contention that his conviction was wrongful and his continued confinement improper." Resp. Br. 8. In fact, petitioner's complaint sought compensatory damages "for violating [petitioner's] civil rights *and* his losses incur[r]ed from his empl[o]yment and farm operations." J.A. 7 (emphasis added). While the violation of petitioner's constitutional rights may have led to his conviction, it does not follow that the *only* damages suffered by petitioner stem from his conviction. Cf. generally *Albright* v. *Oliver*, 114 S. Ct. 807, 815 (1994) (Ginsburg, J., concurring) (noting various harms that can result from Fourth Amendment violation independent of any harm stemming from criminal conviction); *id.* at 821-22 (Souter, J., concurring in the judgment)

Respondents' assertion that a federal court could not award damages in a case such as this one unless it first found the prisoner's conviction illegal is therefore demonstrably erroneous. At the very least, a court could award a plaintiff *punitive* damages without making any such finding. Punitive damages are available under § 1983 upon a showing of reckless disregard or indifference to constitutional rights, even if the victim cannot prove compensable injury. *Carlson* v. *Green*, 446 U.S. 14, 22 n.9 (1980); see also *Smith* v. *Wade*, 461 U.S. 30, 54-55 & n.21 (1983); *Erwin* v. *County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989); *Green* v. *McKaskle*, 788 F.2d 1115, 1124 (5th Cir. 1985). In this case, for example, petitioner could recover punitive damages on his claim concerning destruction of exculpatory evidence simply by showing that the defendants recklessly violated his rights under *Brady* v. *Maryland*, 363 U.S. 83 (1963). The correctness of this analysis is recognized by the *amici* states that are supporting respondents. See *Amici* Arizona *et al.* Br. 21 ("consideration of the punitive damage and declaratory judgment claims does not require the federal court to necessarily conclude that [petitioner's] conviction is wrongful"). In addition, petitioner might well be able to recover nominal damages for respondents' violations of his constitutional rights regardless of the impact of those violations on his criminal conviction.[6]

(same). And petitioner's complaint requested *punitive damages* for violations of petitioner's constitutional rights (see *ibid.*)—a fact completely ignored by respondents.

[6] The strained nature of a test that looks to whether a conviction is somehow "called into question" by the Section 1983 action is made especially clear when a challenge rests on asserted violations of the Fourth Amendment. Claims involving the introduction of illegally obtained evidence are not cognizable under Section 2254 at all. See *Stone* v. *Powell*, 428 U.S. 465, 480-482 (1976). The exhaustion rule of *Preiser* therefore necessarily cannot apply in such a case. Yet petitioner has advanced a Fourth Amendment claim here. See J.A. 4; see also *id.* at 5, 78. Accord *Amici* Arizona, *et al.* Br. 21 (recognizing that petitioner is alleging "an illegal search"). We

3. In nevertheless asking the Court to depart from the approach of *Wolff* and *Preiser*, respondents purport to rely on principles of comity. But the Court should be clear on just how insubstantial is the interest asserted by respondents. At the outset, the suggestion (Resp. Br. 15-16) that collateral estoppel might operate to bar a state from relitigating an issue decided in a prisoner's favor in a prior § 1983 damages action is the reddest of herrings. Respondents concede that "as a general matter, a judgment against a state official in his personal capacity will not bind the government in future litigation" (Resp. Br. 15); they recognize that "not all (or possibly even most) prisoner § 1983 claims attacking the legality of a conviction would have preclusive effect on the state" (*id.* at 16); and they pointedly refrain from suggesting that Indiana would be barred under res judicata from relitigating *any* issues determined in this § 1983 action (*id.* at 16 n.5). They nevertheless ask the Court to rule in their favor because in some future case a state might be bound in a subsequent habeas action if the state exercised sufficient control over the defense of a prior § 1983 suit brought against state officials in their individual capacities. See Resp. Br. 15-16 (citing *Montana* v. *United States*, 440 U.S. 147 (1979)).

The argument is entitled to no weight. Respondents have not cited a *single* case where a government has been held estopped by a judgment against an individual, and diligent research has not disclosed one. On the contrary,

accept as true respondents' representation that materials in the State of Indiana's possession demonstrate that petitioner raised a Fourth Amendment claim during his trial but did not renew that claim in his direct appeal in the Indiana courts. See Resp. Br. 4; Resp. Br. App. 2. But whether that claim—which appears to have been based on an allegation that the search warrant was defective (Resp. Br. App. 2)—is the same as the Fourth Amendment claim asserted in petitioner's Section 1983 action (see J.A. 4-5, 78) cannot be determined from the materials contained in the appendix to respondents' brief.

all of the reported cases of which we are aware hold that collateral estoppel does not operate where successive lawsuits involve governmental defendants who are sued in different capacities. See, *e.g.*, *Headley* v. *Bacon*, 828 F.2d 1272 (8th Cir. 1987) (city officials sued in their individual capacities were not estopped from litigating issues plaintiff had won in § 1983 action against the city); *Garza* v. *Henderson*, 779 F.2d 390 (7th Cir. 1985) (prison officials sued in their individual capacities were not estopped from litigating issues plaintiff had won in *Bivens* action against prison authorities). Indeed, even respondents cannot bring themselves to say that the factors they list *ever* actually would lead to estoppel (see Br. 15 & n.5, 6). Respondents thus are trying to have their cake and eat it too by asking the Court to base its rule on an eventuality that never will come to pass. Yet as respondents themselves recognize while attempting to gore someone else's ox, "[s]peculative concerns about" events "that, in all likelihood, will never take place, are an extremely poor foundation on which to base" any decision by this Court. Resp. Br. 29.[7]

4. The more general concerns of comity articulated by respondents have no substance here. The Court's holdings premised on comity all have had a grounding in the practical realities of government: they are concerned with the possibility of friction where the actions of a federal court would enjoin or otherwise interfere with ongoing state proceedings (see, *e.g.*, *Younger* v. *Harris*, 401 U.S. 37 (1971)); with the institutional competence of federal courts (see, *e.g.*, *Railroad Comm'n* v. *Pullman*, 312 U.S.

[7] In any event, even if respondents are correct that in some minute fraction of cases, the general rule of *Montana* might call for the application of collateral estoppel in a subsequent habeas action brought against a state, there is no reason why this Court could not eliminate that risk by announcing that the federal-law rule of *Montana* would not apply in that context. Cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984) (announcing special rule of collateral estoppel applicable where the United States is a party).

496 (1941)); or with the effect on state institutions that would be effectively *displaced* by organs of the Federal Government (see, *e.g.*, *Rose* v. *Lundy*, 455 U.S. 509 (1982)). But such concerns have absolutely no bearing here.

Indeed, the holdings upon which respondents principally rely themselves demonstrate how far removed is this case from those in which comity principles have led federal courts to decline their " 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1087 (1992) (citation omitted).[8] In *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (cited by respondents at Br. 11, 21), taxpayer plaintiffs brought a Section 1983 damages action challenging various local tax practices as unconstitutional; the individual defendants were "not one or two isolated administrators, but virtually every key tax official in St. Louis County." *Id.* at 114. The Court held that the action could not proceed because it would have had an extraordinarily intrusive effect on the processes of local government.

Not only would such a lawsuit "hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim" (*id.* at 115), but

> a judicial determination of official liability for the acts complained of, * * * would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to

[8] Respondents' reliance (at 6, 19, 21) on *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), is entirely misplaced. The *Rooker-Feldman* doctrine ordinarily bars direct review in the lower federal courts of a decision reached by the highest state court, on the theory that such reviewing authority is vested solely in this Court pursuant to 28 U.S.C. § 1257. *Feldman*, 460 U.S. at 476. The rule is one of preclusion, not of exhaustion. In any event, petitioner obviously is not seeking to appeal (or even to attack) his criminal conviction in this Section 1983 action.

> implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, * * * would promptly cease the conduct found to have infringed [the plaintiffs'] constitutional rights, whether or not those officials were acting in good faith. In short, [the plaintiffs'] action would "in every practical sense operate to suspend collection of the state taxes * * *."

Ibid. (citation omitted). The Section 1983 action thus would have had the effect of working a jurisdiction-wide interference with the administration of the tax system. Here, in contrast, petitioner's action plainly will have no impact on the functioning of government; indeed, as we have explained, it will have no effect even on petitioner's sentence.[9]

The cases of *Younger* abstention upon which respondents rely (Br. 10, 19-21) also involved federal actions that could have caused real interference with essential processes of state government. As respondents themselves recognize (Br. 19 (emphasis added)), the *Younger* doctrine comes into play when federal courts are asked "to disturb *ongoing* state proceedings, particularly criminal ones." The practical dangers to the interests protected under the rubric of comity when federal courts enjoin or otherwise interfere with state judicial proceedings are manifest: serious friction and resentment may be anticipated if a federal court enjoins proceedings in a state tribunal (which would, after all, amount to a direct assertion that the state court was in some way defective); similarly, such a federal action would disrupt the state judicial system in the most direct way possible, while likely also necessitating duplicative proceedings. See generally *Younger* v. *Harris*, 401 U.S. 37, 44 (1971); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Moore* v. *Sims*, 442 U.S. 415, 423 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975). But again, there is no parallel state interest at stake in this case, where there is no ongoing state proceeding with which petitioner's action could interfere.[10]

[9] In fact, in *Fair Assessment* the Court held that the plaintiffs were "*barred* by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." 454 U.S. at 116 (emphasis added). Thus, *Fair Assessment* involved a claim that was held not to be cognizable under § 1983 at all, rather than a claim that was cognizable but could be brought only after exhaustion of other remedies. What is more, the majority in *Fair Assessment* gave as one reason for shutting the doors of the federal courthouse the fact that if plaintiffs' claim were permitted ever to proceed in federal court, it would have to proceed immediately because of the general non-exhaustion rule. See *id.* at 114-115. Here, of course, respondents do not deny that petitioner has stated a cognizable Section 1983 claim.

In fact, respondents are unable to point to any manner in which petitioner's action will interfere even remotely with the processes of state government. Exhaustion generally is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy, which has the effect of nullifying a conviction (or sentence) and short-circuiting the use of state judicial remedies. But an action like petitioner's for money damages—which, it again bears emphasis, are not available in state post-conviction proceedings—does not call into question the correctness of any state judicial determination, does not pretermit use of state judicial procedures (which will have to be invoked if the prisoner seeks release), and does not reflect negatively upon the state courts' ability to enforce constitutional principles. After all, the prisoner's action cannot cause friction by disturbing a state judgment of conviction; it is only a habeas action that has the practical effect of setting aside a state judgment. And for a federal court to provide relief on an *un*exhausted claim does not reflect negatively on the state courts. (To the contrary,

[10] Respondents' argument that "[t]he reasons this Court has held that abstention is inappropriate when state proceedings have yet to begin have no application here" (Br. 20 n.8) is belied by the indisputable fact that *Younger* abstention is inapplicable in this case—as respondents do not deny.

it is a federal court's disagreement with a state court on an exhausted claim that causes harder feelings.)

Nor are respondents correct in suggesting that only a rule of exhaustion would permit the state courts to become familiar with and hospitable toward federal constitutional issues, lead to the development of uniform state rules, or allow the compilation of more complete records. Resp. Br. 12, 14, 20. Respondents have simply offered no reason to believe that these concerns are disserved by having a federal court be the first to adjudicate a prisoner's § 1983 action, particularly if the case must return to the state court for the prisoner to seek release.[11] And respondents' argument (Br. 20) that our approach may lead to inconsistent judgments adds nothing to their position. It is an unavoidable consequence of the dual federal-state court system that there will have to be multiple proceedings in a case such as this one: a state post-conviction (and possibly a federal habeas) proceeding if the prisoner seeks release, and a federal action if the prisoner seeks damages. The only question here is the timing of those proceedings.

Respondents' further argument (Br. 24-25) that our position creates a peculiar hierarchy of values because it allows the prisoner immediate access to federal court for damages while he has to wait to seek release from a federal court is simply silly. The prisoner gets immediate access to federal court in the former situation because a damages action is not the equivalent of a habeas petition, for which state post-conviction proceedings are an acceptable substitute. It thus is undisputed that prisoners get immediate access to federal court for cases challeng-

[11] Respondents have not explained why the existence of a federal judgment touching on issues that arise in a later state proceeding is a cause for concern. Having the federal judgment on the books might well assist the state court without displacing it. After all, federal courts sometimes disagree with state courts by granting habeas petitions; there is no reason to doubt that state courts will do the reverse in appropriate cases.

ing the conditions of confinement, even though those cases are in some sense less important than actions contesting the legality of confinement; that is because conditions cases—like damages actions generally—are not treated as habeas corpus petitions under the rationale of *Preiser*.

In addition, it bears emphasis that respondents' myopic focus on Indiana's interests disregards other important concerns. We explained in our opening brief (at 27-29) that respondents' position takes no account of the policies that underlie Section 1983; respondents make absolutely *no* response. *Preiser* gave a particular reason why congressional intent countenanced disregarding those policies in the circumstances of that case—a reason, as we have explained, that has no application here.[12]

II

If this Court nevertheless concludes that exhaustion is required, it should reverse the court of appeals' decision to dismiss rather than stay petitioner's Section 1983 action. We explained in our opening brief (at 33-41) that

[12] We explained in our opening brief (at 12) that CRIPA confirms the congressional intent regarding application of the "no-exhaustion" rule to most prisoner Section 1983 claims. Respondents nevertheless suggest that reading CRIPA to foreclose exhaustion in a case such as this would "leave[] no room for the rule announced in *Preiser*." Resp. Br. 21-22 n.9. *Preiser*, however, involved a claim that this Court determined was cognizable *only* in an action for habeas corpus (*and not* in an action under Section 1983). See 411 U.S. at 489, 500. Although this Court's decision in *Preiser* explored the boundary between habeas corpus and Section 1983 and discussed the purposes underlying the *habeas* exhaustion requirement, it did not impose any *exhaustion requirement* on the prisoner's Section 1983 action. For that reason, petitioner's interpretation of CRIPA hardly can run afoul of "the rule announced in *Preiser*." Nor would it come as a surprise if the legislative history of CRIPA made no mention of *Preiser* (see Resp. Br. 22 n.9), since the action involved in *Preiser* was determined by this Court not to involve any claim cognizable under Section 1983. Respondents have never suggested—nor could they—that petitioner's action is cognizable *only* in an action for habeas corpus.

the court of appeals' rule of dismissal is inconsistent with the manifest congressional intent as expressed in CRIPA and with this Court's holding in *Deakins* v. *Monaghan*, 484 U.S. 193, 202 (1988). The court of appeals' approach also raises the risk that a damages action, when refiled after exhaustion, will be barred by the statute of limitations. And the Seventh's Circuit's effort to deal with this problem through the creation of a complex, federal equitable tolling rule would not only create a new layer of wasteful and time-consuming litigation but also inevitably bar some meritorious Section 1983 actions that have been rendered stale by the dilatory processing of claims for state post-conviction relief.

1. Respondents' efforts to answer these arguments are wholly unconvincing. Perhaps recognizing that Congress's clear intent as reflected in CRIPA counsels strongly against their proposed rule of dismissal, neither respondents nor their *amici* make *any* attempt to explain why the stay provision in CRIPA does not demonstrate that a stay rather than dismissal is appropriate in this setting. Respondents' perfunctory effort to distinguish *Deakins* (Resp. Br. 30 n.13) is similarly unavailing. Respondents suggest that *Deakins* is inapposite because it did not involve "claims that lay at [the] core of habeas corpus." Resp. Br. 30 n.13. But, as explained above, petitioner's damages claim cannot be said even to be cognizable in a habeas action, much less to lie "at [the] core of habeas corpus." [13]

[13] Contrary to respondents' suggestion (Resp. Br. 30), *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981), does not support a rule of dismissal here. In that case, the Court held that "taxpayers are *barred* by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116 (emphasis added). Because the Court established an absolute prohibition on proceeding in federal court, it would have been inappropriate to stay rather than dismiss the action. That reasoning has no application in this case, where respondents do not suggest that petitioner's action is wholly barred from federal court.

Equally as important, comity concerns simply have no relevance to the question whether a federal court should stay or dismiss a Section 1983 action pending exhaustion. So much is clear from *Deakins*, where the Court held that "a District Court has *no discretion* to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." 484 U.S. at 202 (emphasis added). In so holding, the Court explained that this result "allows a parallel state proceeding to go forward *without interference from its federal sibling*"; it rejected as "groundless" the notion that "the District Court, if allowed to retain jurisdiction, would 'hover' about the state proceeding, ready to lift the stay whenever it concluded that things were proceeding unsatisfactorily." *Id.* at 202-203 (emphasis added). See also *id.* at 203 (stating that it would be "inappropriate" to assume that the federal court "would not hold up its end of the comity bargain"). In short, this Court already has determined that a stay works no interference with the functioning of state courts and in no way harms the principles of comity.[14]

As for respondents' argument (Br. 29-30) that the Court's consistent approach has been to order dismissal of unexhausted habeas petitions, the short answer is that petitioner's Section 1983 action is *not* a habeas petition. In fact, respondents' argument overlooks an obvious difference between habeas proceedings and Section 1983 actions that is central to the question whether a stay or dismissal is the appropriate disposition: while the latter

[14] Respondents contend that *Deakins* "recognized that dismissal might be appropriate 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" Resp. Br. 31 n.13, quoting *Deakins*, 484 U.S. at 203. In fact, it is far from clear that the quoted language from *Deakins* was meant to endorse the possibility of ever dismissing a case like this. In any event, respondents have failed to identify *any* state interest, let alone an important one, that would be advanced by dismissing such an action.

are subject to statutes of limitations, the former are not. See *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1721 (1993); *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986). Because habeas actions are not subject to time bars, dismissal poses no danger to a claimant's rights. Here, in contrast, petitioner's action will be barred if dismissed.

2. Unable to identify any authority for the proposition that the passive retention of § 1983 cases on the federal docket pending exhaustion of state remedies would interfere with state interests, respondents fall back on the argument that dismissal is appropriate because it would advance *federal* interests by ridding the federal courts of "thousands of frivolous actions" brought by state prisoners under § 1983. Resp. Br. 31.[15] In other words, respondents contend that petitioner's Section 1983 action should be dismissed rather than stayed because "the vast majority" of such actions will "ultimately be found [to be] without merit." Resp. Br. 31; *id.* at 31-35.

This argument, of course, is flatly inconsistent with the congressional decision to give state prisoners a Section 1983 remedy, and it thus is no surprise that contentions like respondents' have been rejected repeatedly by the Court. See, *e.g.*, *Felder* v. *Casey*, 487 U.S. 131, 149-150 (1988) (rejecting as "manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes" the argument that an exhaustion requirement should be imposed on Section 1983 actions in order to "sift out 'specious claims' from the stream of complaints that can inundate local governments") (internal citations omitted); see also *Burnett* v. *Grattan*, 468 U.S. 42, 54-55 (1984); *Howlett* v. *Rose*, 496 U.S. 356, 379-380 (1990). Indeed, insofar as respondents are correct in observing that many prisoners civil rights suits clearly lack sub-

[15] Although respondents decry the retention of prisoner lawsuits on the federal docket, they fail to identify any nonnegligible costs associated with retaining jurisdiction over dormant actions.

stance, their assertion *supports* our position (Pet. Br. 40) that it will be considerably easier for courts to resolve such claims on the merits than to deal with the complex statutes of limitations questions raised by dismissing them pending exhaustion.[16]

3. Respondents' final contention—that dismissal should be ordered because state or federal tolling doctrines would protect petitioner from operation of the statute of limitations (Br. 35-38)—is equally flawed. To begin with, respondents' argument (*id.* at 36) that Indiana law would toll the two-year statute of limitations on the Section 1983 action during the pendency of the state post-conviction proceedings is inconsistent with their position in the Seventh Circuit. In their supplemental brief below, respondents (citing the *Cockley* decision upon which they now rely) canvassed several areas of state caselaw and concluded that "[t]here is, in short, no clear answer as to whether Indiana would recognize equitable tolling on the facts presented in the case at bar." CA Supp. Br. 6. See also Br. in Opp. at 18 (describing the Seventh Circuit's approach as "clearly the proper one"). In addition, respondents' unwillingness to concede that Indiana's rule would apply during the pendency of any appeal from an adverse initial decision (see Resp. Br. 36 n.20) shows that any tolling permitted by Indiana law is extremely limited. In any event, the confusion over this point serves principally to illustrate the accuracy of the

[16] It is worth noting that respondents may understate the number of prisoner Section 1983 suits that state substantial claims. It appears that a significant proportion of prisoner lawsuits are in fact settled prior to trial, resulting in some relief for the plaintiff. See Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 439 n.93, 458 (1993) (based on empirical study of prisoner civil rights actions in Eastern District of Missouri and Eastern District of Arkansas, finding that 5% and 6% of cases, respectively, were settled and that 8% and 16%, respectively, were voluntarily dismissed by the prisoner with or without settlement).

observation in our opening brief (at 39) that determining the nature of state tolling rules would be a difficult and time-consuming task.

As for respondents' suggestion that a federal tolling rule be created, we observed in our opening brief (at 40-41) that application of such a rule also would be burdensome and complex—and still might result in the barring of meritorious claims where, through no fault of the prisoner, the defendant was prejudiced by delay in the disposition of state proceedings. For their part, respondents make *no* attempt to defend the Seventh Circuit's cumbersome rule of equitable tolling. See Resp. Br. 38 n.21 ("[R]espondents agree with petitioner that the court of appeals' detailed discussion of the probable contours of any such [federal equitable tolling] doctrine was unnecessary, and express no opinion whether those contours were accurately described."). Compare Br. in Opp. at 18 (describing the Seventh Circuit's approach as "clearly the proper one"). But the problem cannot be avoided simply by ignoring it. According to respondents, state and federal tolling rules would save any "truly meritorious" Section 1983 claims. Resp. Br. 37 (emphasis omitted). The limitations issue, however, hardly can be litigated only after a court determines that a prisoner's claim is meritorious. On the contrary, the issue will be resolved at the threshold of prisoner § 1983 actions subject to exhaustion. That will result in an enormous waste of judicial resources.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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